

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 26, 2005

IN RE:

**SPRINT UNITED TARIFF 2003-710 TO
INTRODUCE SAFE AND SOUND II SOLUTION**

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**DOCKET NO.
03-00442**

ORDER GRANTING MOTIONS TO CLARIFY

This matter came before Chairman Pat Miller, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this Docket, at a regularly scheduled Authority Conference held on February 28, 2005 for consideration of the *Motion for Clarification* filed by United Telephone-Southeast, Inc. ("Sprint" or "UTSE") on January 24, 2005 and the *Motion to Clarify Order Denying Tariff as Filed* filed by BellSouth Telecommunications, Inc. ("BellSouth") on January 25, 2005.

BACKGROUND

Sprint filed a tariff with the Authority on June 11, 2003 with an effective date of July 30, 2003. The Safe and Sound II Solution Tariff ("Tariff") offered local exchange service with Caller ID for \$19.95 conditioned on the customer also purchasing inside wire maintenance and a warranty for customer-owned premise equipment.¹ Sprint's inside wire maintenance and equipment warranty programs are non-regulated offerings.

After Sprint filed its Tariff, Authority Staff contacted Sprint regarding the availability of the Tariff for resale. On July 14, 2003, Sprint submitted a letter stating that the Tariff was

¹ Sprint's inside wire maintenance products offered in conjunction with this Tariff are LineGuard or Data LineGuard. The CPE warranty program offered in conjunction with the tariff is CPE Warranty Plus.

available to resellers as long as they provided comparable deregulated services. Sprint also revised the effective date of the Tariff to August 4, 2003. On July 24, 2003, however, Sprint altered its position regarding resale of the Tariff, claiming that since the bundled offering includes non-regulated services it is not obligated to offer any portion of the offering for resale. Sprint stated that a reseller could obtain the local service portion of the proposed offering from its general subscriber tariff at a wholesale discount and then assemble any bundled offering it may wish. Sprint's July 24, 2003 correspondence also revised the effective date of the Tariff until September 8, 2003.

On September 5, 2003, the Consumer Advocate and Protection Division ("Consumer Advocate") filed a petition for leave to intervene, and on September 11, 2003, BellSouth filed a petition for leave to intervene. On September 8, 2003, the panel suspended the Tariff until September 22, 2003, and on September 22, 2003 the panel re-suspended the Tariff until October 6, 2003. At the October 6, 2003 Authority Conference, the panel granted the interventions of the Consumer Advocate and BellSouth, convened a contested case and asked for briefs on the following legal issue:

Whether state and/or federal statutes, rules, orders, or other provisions require that all or any part of any offering which bundles regulated service and non-regulated services be made available for resale? If so, should the wholesale discount apply? If yes, how should it apply?

The panel also suspended the effective date of the Tariff until November 20, 2003. The initial briefs were submitted on October 20 and 21, 2003. Reply briefs were filed on October 27 and 28, 2003.

On November 21, 2003, after all briefs on this legal question had been filed, AT&T Communications of the South Central States, LLC ("AT&T") petitioned to intervene in this Docket. At the November 24, 2003 Authority Conference, the Tariff was re-suspended for 21

days to allow the legal question, its impact on the Tariff, and AT&T's petition to intervene to be considered by the panel at the December 15, 2003 Authority Conference.

At the December 15, 2003 Authority Conference, the panel voted to grant AT&T's intervention, agreed that the Tariff could not be accepted as filed, and gave Sprint until December 29, 2003 to meet with the other parties and to file a modified tariff. Specifically, after commenting that "the tariff as it exists today cannot be approved," Director Kyle moved that "Sprint be given two weeks, until December 29th, 2003, to work with the intervenors on modifying the tariff to comply with the resale requirements of the Act."² Director Jones then stated that "I think that it is appropriate that Sprint try to work with the intervenors – the other parties in modifying this tariff"³ After stating his specific concerns about the Tariff, Director Jones further stated, "it would be appropriate that Sprint try to sit down with the Advocate, AT&T, the other parties to try to work out some kind of mechanism that would recognize at least the concerns that I've articulated, and so with those comments I would -- . . . -- with those comments, I would second the motion."⁴ Director Miller then voted aye.⁵

On December 29, 2003, BellSouth filed a motion for reconsideration ("*BellSouth Motion for Reconsideration*"), requesting that the panel reconsider its decision "to deny the Tariff on the basis of resale concerns articulated with respect to this bundled offering"⁶ in order to provide the parties with an opportunity to present oral argument addressing "both the legal issues common to this bundle and other bundled offerings as well as the policy issues which may differ depending on the services bundled together."⁷ Also on December 29, 2003, the Authority received a letter

² Transcript of Authority Conference, pp 15–16 (December 15, 2003)

³ *Id* at 16

⁴ *Id* at 17

⁵ *Id*

⁶ *BellSouth Telecommunication Inc 's Motion for Reconsideration*, p 1 (December 29, 2003)

⁷ *Id*

from Sprint, dated December 23, 2003, stating it was withdrawing the Tariff. Sprint noted that it had concluded that its position was correct as evidenced by the fact that the Tariff had been approved in 16 other states.

JANUARY 10, 2005 ORDER

The Authority's *Order Denying Tariff as Filed* ("*Order*"), based on the decisions at the December 15, 2003 Authority Conference, was issued on January 10, 2005. According to the *Order*, the voting panel acknowledged that, pursuant to the statutory resale obligations of the Federal Telecommunications Act, ILECs must make available for resale at wholesale rates all telecommunications services that are provided by the carrier to customers at retail. The *Order* stated that this resale obligation requires ILECs to make available for resale a bundled telecommunications offering. Further, the *Order* states that the panel found that the Tariff provides for a bundle of telecommunications services, local exchange service and Caller ID, that are offered at retail and concluded that the bundle must be made available for resale. According to the *Order*, the panel voted unanimously to deny the Tariff in its current form, pursuant to the representations of Sprint, and to allow the parties until December 29, 2003 to discuss a way in which the Tariff could be modified to be compliant with federal resale requirements and the Authority's decision. In addition, the panel unanimously granted the petition of AT&T to intervene in this docket to allow AT&T to participate in the meeting of the parties.

SPRINT'S MOTION FOR CLARIFICATION

On January 24, 2005, Sprint filed its *Motion for Clarification* ("*Sprint Motion*"). In the *Sprint Motion*, Sprint argues that although it appears from the transcript of the December 15, 2003 Authority Conference that the panel did discuss whether the Tariff should be approved, there was no clear indication of a vote denying the Tariff. Rather, according to Sprint, a review of the transcript indicates

that the Authority was willing to provide an additional two weeks until December 29, 2003 for the parties to resolve this matter and then reconsider the Tariff if agreement had been reached. Sprint states that it acted consistently with its belief that the suspension period was extended and, as a result, sent a letter to the Authority advising that Sprint was withdrawing the Tariff as filed. Sprint believed that the only action required by the Authority would be an order granting the withdrawal of the Tariff. Therefore, Sprint is requesting clarification of the *Order*, which it states denies a Tariff that had been withdrawn prior to the end of the suspension period. Sprint further requests that the Authority issue an order clarifying the *Order* and grant Sprint's withdrawal of the Tariff, thereby closing the docket. Finally, Sprint alleges that the requested relief will not act to harm or prejudice the rights of any of the parties to this docket and believes that its request is consistent with the vote of the panel in the transcript of the December 15, 2003 Authority Conference.

BELLSOUTH'S MOTION FOR CLARIFICATION

On January 25, 2003, BellSouth filed its *Motion to Clarify Order Denying Tariff as Filed* ("*BellSouth Motion*"), in which it argues that the *Order* fails to accurately reflect the resolution of the Docket. Specifically, at the January 5, 2004 Authority Conference, BellSouth points out that Director Kyle noted in her comments regarding Docket No. 03-00512⁸ her support for BellSouth's motion to reconsider the panel's decision in this Docket. BellSouth states that Sprint did not resubmit its Tariff, even after Director Kyle made her comments and moved to approve BellSouth's Integrated Solutions tariff in TRA Docket No. 03-00512. As a result of the withdrawal of the Tariff, BellSouth asserts this Docket was mooted and the panel never acted on the *BellSouth Motion for Reconsideration*.

BellSouth urges the Authority to clarify the *Order* to avoid confusion regarding the precedent for bundled offerings involving both regulated and unregulated services. Specifically, as ordered by

⁸ *In re Promotion to Introduce BellSouth Integrated Solutions Program -- Tariff Number 2003-956*, TRA Docket No. 03-00512

the TRA in Docket Nos. 03-00554⁹ and 03-00624,¹⁰ resale requirements for bundled offerings were satisfied when the individual regulated components were made available for resale at the tariff rate less the wholesale discount. According to BellSouth, the Authority found that it was not necessary for resale to be based upon a prorated portion of the bundle discounted, when such prorated prices were not available to actual customers in the market. This ruling was consistent with Federal Communications Commission “teachings” on bundling, and is the most recent pronouncement of the TRA regarding the proper treatment of bundled offerings. Thus, BellSouth requests that the Authority issue an order clarifying its previous *Order*, noting Director Kyle’s comments and that this docket was mooted by the withdrawal of the Tariff before the Authority was able to consider the motion to reconsider filed in this Docket. BellSouth also agrees with Sprint that the panel did not vote to deny the Tariff, but rather the panel decided to “provide additional time for the parties to discuss a potential resolution of the issues raised by the interventions.”¹¹

CONSUMER ADVOCATE’S RESPONSE IN OPPOSITION TO MOTIONS FOR CLARIFICATION

On February 1, 2005, the Consumer Advocate filed the *Consumer Advocate’s Response in Opposition to Motions to Clarify Order Denying Tariff as Filed* (“*Response*”). In the *Response*, the Consumer Advocate urges the Authority to deny the motions for clarification filed by Sprint and BellSouth. The Consumer Advocate argues that, although the motions are styled as motions for clarification, they are actually motions for reconsideration subject to TRA Rule 1220-1-2-.20. The Consumer Advocate asserts that BellSouth and Sprint are actually asking the TRA to change the result of the *Order*, not just to clarify it. In addition, the Consumer Advocate alleges that neither BellSouth nor Sprint have followed proper procedure for motions for reconsideration.

⁹ *In re Tariff to Establish the Wireless Answers Promotion -- Tariff Number 2003-1036*, TRA Docket No 03-00554

¹⁰ *In re Tariff To Establish Consumer Wireless Combined Bill Reward Offer -- Tariff Number 2003-1379*, TRA Docket No 03-00624

¹¹ *BellSouth Motion*, p 1, fn 1 (January 25, 2005)

The Consumer Advocate further states that the withdrawal of the Tariff after the panel's decision did not operate retroactively to vacate the rulings. According to the Consumer Advocate, the only way around the decision is through further and additional rulings, not through "clarification." The Consumer Advocate states that the *Order* was in all respects consistent with the bench decision. The Consumer Advocate argues that Sprint and BellSouth are seeking to undercut the Consumer Advocate's position on the appeal of the issue of whether tariffs such as Safe and Sound are legal or not because the Consumer Advocate relied on the bench decision in this docket in its appellate brief. Finally, the Consumer Advocate argues that the *Order* is clear and accurately reflects Director Kyle's motion denying the Tariff as it existed at the time, which was made at the December 15, 2003 Authority Conference.

THE FEBRUARY 28, 2005 AUTHORITY CONFERENCE.

At the regularly scheduled February 28, 2005 Authority Conference, a majority of the voting panel found that the January 10, 2005 written *Order* does not accurately reflect the decision made by the panel at the December 15, 2003 Authority Conference. A majority of the panel found that the prevailing motion at the December 15, 2003 Authority Conference was that Sprint be given until the December 29, 2003 deadline to meet with the parties and to modify the Tariff. A majority of the panel found that the actual decision to deny the Tariff was never made because, before the deadline for modification passed, Sprint withdrew the Tariff. Therefore, a majority of the panel concluded that the portion of the written *Order* issued on January 10, 2005 stating that the Tariff was denied is incorrect. A majority of the panel found that the Consumer Advocate's objection that Sprint's *Motion for Clarification* is actually a motion for reconsideration of the decision is without merit because the decision of the panel will not be changed from that decision stated orally on December 15, 2003. Based upon these findings, a majority of the panel voted to grant the *Sprint Motion*.

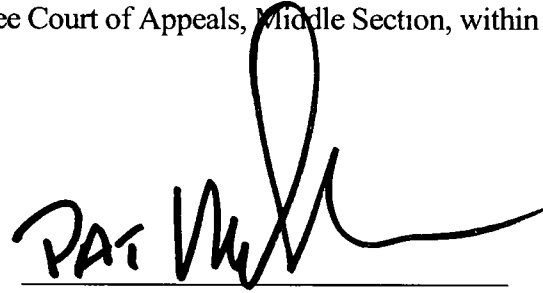
Further, a majority of the panel voted to grant the *BellSouth Motion* to the extent that the written *Order* should reflect that the Tariff was not denied, consistent with the panel's December 15, 2003 decision. In all other respects, a majority of the panel voted to deny the *BellSouth Motion*.

Further, a majority of the panel voted that the January 10, 2005 *Order* be withdrawn and that a corrected written Order be issued that accurately reflects the panel's oral decision of December 15, 2003. Finally, the majority of the panel voted to grant Sprint's withdrawal of the Tariff as filed on December 29, 2003.

IT IS THEREFORE ORDERED THAT:

1. The *Motion for Clarification* filed by United Telephone Southeast, Inc. is granted;
2. The *Motion to Clarify Order Denying Tariff as Filed* filed by BellSouth Telecommunications, Inc. is granted to the extent that the written order should reflect that the Tariff was not denied, consistent with the panel's December 15, 2003 decision. In all other respects, the *Motion to Clarify Order Denying Tariff as Filed* is denied;
3. The January 10, 2005 *Order* shall be withdrawn and a corrected written Order shall be issued that accurately reflects the panel's oral decision of December 15, 2003;
4. United Telephone Southeast, Inc.'s request to withdraw Tariff 2003-710 is granted;
5. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and

6. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

A handwritten signature in black ink, appearing to read "PAT MILLER", written over a horizontal line.

Pat Miller, Chairman

A handwritten signature in black ink, appearing to read "Sara Kyle", written over a horizontal line.

Sara Kyle, Director

Ron Jones, Director¹²

¹² Director Jones voted to deny the motions for clarification filed by Sprint and BellSouth because in his opinion the January 25, 2005 *Order* accurately reflects the panel's vote at the December 15, 2003 Authority Conference. Director Jones believes that the motion approved on December 15, 2003 was a denial of the Tariff and that the parties were encouraged to work out a new acceptable tariff by December 29, 2003.